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No. 86-354

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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STEWART G. HUBER, MYRON A. MAIEWSKI,
JOHN F. APITZ, BILLY R. BURKE,
WILLIAM F. BURNETTE, BRIAN D. BURNS,
LARRY E. DAHL, and J. FRED KING,
*Petitioners,*

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

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The Brief in Opposition neither defends, nor denies the importance of, the principal holding of the Federal Circuit, that the *Chenery* rule provides "no . . . restraint" on an independent adjudicatory Board's treating an administrative action as if it had been taken on a legal authority which the agency never invoked (Pet. App. 7a); and that Petitioners in arguing for such a restraint "confuse the assigned roles of the Board, itself part of the administrative agency structure, and the courts" (*id.*, 6a). Instead, Respondent attributes to that Court a "bottom line" approach which denies relief to employees wrongly separated under one personnel authority if they

were untenured and hence could have been separated without appeal rights under a different authority. But this argument—and Respondent's corollary suggestion that it is supported by the first *Chenery* decision—not only reads the decision below inaccurately, but raises even broader questions of administrative and personnel law. In fact, Petitioners submit that Respondent's "defense" is, effectively, an attack on the holding and reasoning of this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). Its arguments therefore only raise the significance of the case and the need for review.

The Government itself is currently seeking review of a Federal Circuit decision recognizing the right of this very class of employees to question the legality of adverse actions in Tucker Act suits. *United States* v. *Fausto*, O.T. 1986, No. 86-595. It is poorly situated to contend that the present ruling—which it does not deny would preclude the same large class from contesting misuse of the reduction-in-force authority—does not also warrant review. Petitioners submit that, as this case presents issues affecting the integrity of the *Chenery* rule and the independence of the Merit Systems Protection Board, it is a stronger one for review than *Fausto*.

1. Respondent's plea (*e.g.*, br. in opp. 12) that the "bottom line is clearly correct" because, allegedly, the Department of Agriculture *could* have separated Petitioners readily in an adverse action, is precisely the contention rejected by this Court in *Vitarelli* v. *Seaton*, *supra*. *Vitarelli* refutes in this exact context Respondent's contention that the first *Chenery* decision allows the reviewing forum to deny relief for violations on the "bottom line" theory that the agency could have taken an unassailable action. The four concurring justices, in an opinion by the author of *Chenery I*, indeed cited that decision for just the opposite proposition, 359 U.S. at 546-47. While Respondent views the result below as avoiding "'wasteful' expenditures of administrative resources"

(br. in opp. 8), this Court in *Vitarelli* held that *relief* must be granted those separated under an authority which did not support the action. Holding an agency to legal authority it invoked has never before been held expendable as a "waste;" instead it preserves integrity in administrative agencies.[1] In the cases we have cited (Pet. 11-12) in which an employee prevailed on the ground that a supposed RIF was aimed at him personally, the Board's opinion concluded with a standard order for reinstatement and back pay.

2. In seeking to explain each action and decision involved on bases other than that on which it was taken, Respondent only compounds the violation of the *Chenery* rule, by engaging in classic *post hoc* rationalization. The *Chenery* violation is not explained away by the euphemistic characterization of the flaw in the Department of Agriculture's action as being merely that it "mistakenly labeled a removal a RIF" (br. in opp. 13, also

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[1] Often when an agency which has taken an errant circuitous path complains that there should be no consequences because it could have acted directly, the latter proposition is not so clear. Although whether or not that was true here seems irrelevant to the issues now before the Court, in view of Respondent's reliance on the proposition, it may be helpful to put some perspective on the matter. The Department of Agriculture chose the reduction-in-force route in circumstances indicating that any overt adverse action would be subject to serious challenge: (a) a District Court had ruled only months before, that dismissals from one of these positions for partisan political reasons violated this Court's decision in *Branti* v. *Finkel*, 445 U.S. 507 (1980), *see Delong* v. *United States*, Civil No. 78-294-A (E.D. Va.) (per Bryan, J.), decided Sept. 18, 1980, vacated as moot in accordance with settlement agreement, No. 80-1713, 4th Cir., Nov. 24, 1981 (holding, after trial, that the essential functions of the position were that of managing credit and no necessity was shown for politicizing it, despite a considerable practice of doing so); (b) a long-standing Court of Claims decision held that political affiliation was not "cause" for dismissing veterans from the position, *Schmidt* v. *United States*, 145 Ct.Cl. 632, 636 (1959), later opinion, 153 Ct.Cl. 407 (1961); and (c) the agency needed to act with respect to both veterans and non-veterans.

"Question Presented").[2] According to this unprecedented theory of Respondent, any administrative choice as to what action to take may be deemed merely a "label" which the reviewing forum may revise in order to sustain the action under a different guise. Respondent's theory should only heighten the conclusion that the Federal Circuit's ruling represents such an easy route around the *Chenery* rule as to seriously weaken it.

In the particular personnel law context indeed one cannot accidentally mislabel an adverse action a RIF; there is always a deliberate choice because, as Respondent admits (br. in opp. 13), the *motivation* of the two actions is different: one, as its name implies, must be based solely on managerial reasons, such as a lack of funds requiring a "reduction-in-force;" the other is directed to the qualifications of the individual. Respondent's argument applies equally to all cases in which the reduction-in-force authority is misused. If the ruling below stands, then every RIF taken for reasons personal to employees constitutes a "mislabeling" which the Board may "correct" by purporting to find that it actually is an adverse action. In this way, the right of hundreds of thousands of excepted service non-veteran employees to appeal from RIFs—recognized in many prior Board cases (see Pet. 10-13)—would disappear through a semantic device.

3. Respondent misreads the Petition in stating (br. in opp. 13) that we assert that the ruling below produces irrational distinctions "between veteran and non-veteran employees." Instead, the examples of irrationality (Pet. 13-14) are ones of anomalous distinctions between em-

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[2] The Federal Circuit's similar euphemism was that the Board merely corrected a mistake in the agency's having "initially designated" the action as a RIF (Pet. App. 7a). Nothing in the announcement of a RIF is amenable to such a characterization, either in this case (Pet. App. 54a-57a), or in any other. The only reason that the designation proved to be "initial" here was that the Board wrongly switched to another.

ployees, all of whom are non-veterans. Respondent has offered this Court no explanation how the ruling below coud work sensibly in practice.[3]

## CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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[3] As Respondent notes (br. in opp. 2 n.1), by inadvertence, we cited 28 U.S.C. § 1254(3) as the jurisdictional basis for the Petition. The intended and correct basis is 28 U.S.C. § 1254(1).